THE ELECTIVE AND APPOINTIVE METHODS OF SELECTION OF JUDGES[1]

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IN England the crown has from the earliest times appointed the judges, originally with no very definite limitation of their duties to functions now regarded as judicial. They remained subject to removal by the crown until 1688, after which time their tenure was during good behavior. One of the important causes which dethroned the Stuarts was their coercion of the judges, and much of the American feeling for an independent judiciary as the security of liberty undoubtedly goes back to that period and to the great English struggle for popular government, because the colonists were nearly all good Whigs and especially fond of the Bill of Rights. Nevertheless, it was George III, the apostle of absolutism, who finally secured the entire independence of the judges by providing that they should keep their commissions on the demise of the crown.

When the colonies came to make their constitutions, they generally accepted such institutions as they were used to, and most of them provided for the appointment of the judges by the executive. Yet even at the outset, in some states the elective principle obtained. Thus in New Jersey, Virginia and South Carolina the legislature elected the judges, and Vermont and Tennessee when they became states in 1793 and 1796 each adopted the same practise. Georgia has the distinction, good or bad, of being in 1812 the first state to elect any judges by vote of the people, though the change applied only to the inferior courts, and it was not till twenty years later that Mississippi, in a burst of democratic enthusiasm, became the first to elect all its judges by popular vote. Since that time this method has been very generally extended. The great state of New York,

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which gave her laws to many of her younger sisters, followed in 1846 under the full tide of Jacksonian democracy, and has been consistently loyal ever since. To-day the process is complete except in some of the eastern states. The legislature appoints in Rhode Island, Virginia and South Carolina, while the governor, with the consent of the senate, appoints in New Jersey and Mississippi, the governor and council in New Hampshire, Massachusetts and Maine, the governor alone in Delaware, and the legislature on nomination of the governor in Connecticut. Thus, in three-fourths of the states to-day judges are elected by popular vote. It may be said that the institution of judicial election has hitherto generally been regarded by the American people as implied in a thorough-going democratic state.

To ascertain the effect upon the judiciary of elective selection is difficult without a good deal of research; perhaps it is impossible. Undoubtedly, the general opinion of the bar is in favor of appointment. I think there can be no impropriety in my saying that the federal judges have generally, in most parts of the country, a somewhat better reputation with the bar for ability than the state judges. Probably the greatest state courts have been in states which appointed their judges. Thus, Masssachusetts has been easily pre-eminent over all other states in the quality of her judges, and for many years New Hampshire had a court which was hardly, if at all, second to that of Massachusetts. New Jersey has likewise an enviable record. However, the evidence is by no means all one way. Michigan for a while had a court of most distinguished reputation; New York, since 1846, has produced individuals of fine capacity, and Vermont and Pennsylvania have had creditable records. Besides, the problem is much complicated by other factors, especially the character of the tenure, of which more hereafter. For example, in by far the greater number of states the federal judges receive a larger salary than the highest state judges. Their tenure is for life and until about twenty years ago appeals, at least from the circuit judges, were so expensive and slow as to be practically impossible in ordinary cases. As a result, the position of federal judges in most states was more attractive in

every way than any place on the state bench, so that if the incumbents deserved or had a higher reputation than the state judges, it should not necessarily be attributed to the mode of their selection.

Again, in Massachusetts the whole administration of the state was for long on a decidedly higher level than elsewhere, and the character of the judges was very probably only a reflection of a generally better political tone. In New York, there certainly has been a great general decadence in judicial ability since 1846, due to a good many other reasons, I believe, than the election of the judges, and indeed, perhaps, not due to that at all. The evidence, therefore, would hardly justify one in going further than to say that the experience of sixty years seems to suggest a falling off in ability where the judges have been elected. How far this decline in ability has had to do with the present popular distrust of the judiciary as a whole, it is naturally impossible to tell. That it has perhaps had nothing at all to do with it is suggested by the fact that on the whole the federal judiciary is at present more jealously and suspiciously regarded than that of the states.

There remain *a priori* considerations, at best feeble supports for a conclusion. In the first place, one is tempted to say with Dana in the Massachusetts convention of 1853 and Chambers in the Maryland convention of 1851 that the mode of selection makes very little difference and that the same influences which control the caucus—or, as we should say, the party—will control the governor. There has been some corroboration of this in New York, whenever the governor has been in harmony with the local leaders; other experience I do not know. However, there have arisen governors from time to time who have been independent of the party, while they have not been strong enough to dominate it. Such men as Mr. Justice Hughes, for example, would have appointed, and did appoint, different judges from those whom either of the parties have as a rule put upon the bench. In short, in so far as a governor becomes independent of party influences we must expect that the result of appointment will be different from that of election, which is necessarily dependent upon party control. Have we a right to ex-

pect that this will become less or more frequent, and have we a right to expect that if it becomes more frequent, it will result well or ill?

The signs of the times, in so far as we can see, point to a decay in the party system. Direct primaries are a blow to it, little though they appear to be such superficially, because, while at first blush they serve to accentuate the division of voters into parties, they at the same time tend to destroy the influence of the permanent party leaders, as indeed present experience is showing and as the universal instinct of the leaders themselves foretold, though their speech denied it. Such primaries undoubtedly give a great advantage to the independent individual of taking personality, providing he can command enough money to secure publicity; they tend to minimize the influence of those who through the general apathy keep the control of nominating machinery.

If with a system of direct primaries there be coupled the short ballot, the governor's independence of party will be increased. Moreover, it would hardly be possible that direct primaries should continue without the addition of the short ballot, for popular interest would certainly not survive an appeal by several candidates for the many offices now elective. Indeed, the very apathy which has led to party domination in the case of minor administrative officers would frustrate a system of primaries for all such as are now elected. The system of direct election has broken down, because the people cannot be expected to know anything about the minor officers to be elected. Even less would they distinguish between the candidates for nomination to such offices. The success of direct primaries, even for the chief executive, depends in large measure upon the power and responsibility of that officer. The short ballot to-day commands the assent of substantially all parties, and is the proposal apparently most likely to succeed of all those at present prominent. It results in a consolidation of power which undoubtedly would not be accepted without some continuous popular control over the executive, but it is so obviously a necessary corollary to direct selection of the executive by the people that even the most thorough-going democrat will be

likely to accept it. That it should include the appointment of judges by the executive is most probable. A judge is an administrative officer, little as American traditions like to concede it; he is concerned only with the enforcement of the sovereign's will; and there is no reason why he should not be appointed by the executive, if other administrative officers are so appointed. The considerations which require his independence of the executive arise only after he is appointed to office; they affect only his indifference to pressure in individual cases, pressure which cannot be exercised in advance of their occurrence. If the short ballot comes, every reason for it applies to including judges within it.

In answer to the first question, therefore, we may say that there is good reason for supposing that in the future a directly nominated governor will appoint the judges, and that whether or not he has this power, it would, if he did have it, be under the control of influences different from those that have controlled election or would continue to control it if judges should remain elective. The distinction which Dana in Massachusetts and Chambers in Maryland could not see in the fifties would arise if the people became accustomed to choose their chief executives directly, whether by direct primary nominations or by direct election without party name or symbol and without preliminary nomination. There remains the question whether the operation of this change will affect the appointment of judges favorably or not.

While a governor elected by direct primary would be more directly responsive to popular feeling, since his continued possession of power would depend upon the popular approval of his personal conduct, his judicial appointments, unless scandalous, would weigh very little in the balance for or against him; for so far as we can judge, the personnel of candidates for the bench is a matter of almost complete indifference to the people at large. It is true that they become easily aroused over the conduct of an incumbent, but between candidates they usually, and quite rightly, assume the indifference of ignorance. Thus a governor would not have to reckon very seriously with present-day public opinion in his judicial appointments if he

avoided scandal. Because of the same public indifference, the party leaders need reckon, and have reckoned, but little with public opinion in the nomination of elective judges. This would remain quite as true under a system of direct primaries for judges, for it is hardly conceivable that primary contests between judges should arouse much public interest.

Assuming, therefore, that direct public interest in the matter, barring actually scandalous instances, must be eliminated, whichever the method of choice, have we reason to suppose that a governor, dependent upon the people, would do better or worse than the party leaders acting as it were behind the scenes? This question is of course not peculiar to the appointment of judges; it raises indeed the whole question of the working of the short ballot. An executive vested like the President with general power of appointment, but unlike him directly dependent upon the popular will for his selection, even while he may in the case of a single appointment have little to reckon with, does on the whole carry his record to the people, and it all goes together into a general pot which the people may or may not relish, as the flavor turns out. But it is also true that precisely the same responsibility rests upon the party collectively, and the party has the same incentive to act agreeably to the popular taste; it is moreover true that a party is after all nothing but a group of men, who enjoy power and wish to do what they can to keep it. Parliamentary government may be better or worse than a directly representative executive, but it is quite idle to consider parliamentary government for the United States, for any time that we can see. The real point with us is this: that is not parliamentary government which vests an uncertain power in the hands of unknown men who have no formal responsibility, so that the actual power is in fact unseen, and the individuals who exercise it do not themselves come before the public. A ministry is one thing, a cabal another. We cannot fail to profit by a change from appointment by cabal to appointment by a genuinely representative elected executive.

While, therefore, under the system which has actually existed, it is perhaps questionable whether appointed judges have been better than elected, there is good ground to suppose that under

a system of appointment by executives not dependent upon party, judges will be better than if chosen formally by an indifferent electorate, but actually by a group the power, influence and tenure of whose uncertain members cannot be definitely ascertained.

Strictly speaking, the subject of this paper does not include the tenure of judges, and a consideration of that subject certainly trenches somewhat upon the subject of the recall. Nevertheless, historically the method of selecting judges has been interwoven in constitutional discussion with tenure in such a way that it is really quite impossible to omit all reference to the latter. In the Maryland and Massachusetts conventions in the early fifties, the conservatives realized that the real fight was not as to whether judges should be elected or appointed, but whether they should be subject to political influence after taking office. All the arguments which now appear in relation to the recall were made with as much ability then as now. On the one hand the conservatives feared for the integrity of the judges; on the other, the democrats resented their absolute independence. There was no suggestion made of popular election for a term of good behavior and the institution does not exist in the United States to-day. In Massachusetts, New Hampshire, Rhode Island and Delaware at the present time the judges hold during good behavior; in the other states for terms varying from two years in Vermont to twenty-one in Pennsylvania. In Massachusetts judges are subject to recall by the governor on address by a majority vote of both houses, without charges or trial; in New York by a two-thirds vote of both houses on charges; and legislative recall is a common feature in state constitutions. The limitation of tenure which was so much feared a half century ago, therefore, has actually been brought about, and the judges are to that extent within popular control. Whether such limitation and control is desirable or not is quite another question.

The purpose of a limited tenure is of course to relieve the office of an undesirable incumbent, a purpose certainly wise and commendable. There are two grounds for removing a judge: first, that he has actually misconducted himself in ways which

may be specified and proved; second, that he has shown himself undesirable in respect to his ability, his political or economic bias, or that vague range of conduct which we group together under temperament. Fair play and the general experience of most civilized peoples require for the first cause something in the nature of charges and proof; this would indeed meet with very general approval. It is as to action on the second ground that difference of opinion arises. One party insists that since the judge has no right to regard any popular expression except what has already obtained formal authoritative expression, therefore to make him answerable to public opinion is to put upon him an influence which cannot possibly operate except to corrupt his integrity. For popular opinion, intent upon its as yet unexpressed purpose, will forget that it is the judge's duty to regard only what has already received expression. The other party insists that though the judge is unquestionably limited by the existing authoritative expression of the public will, so also are all other administrators of law, as to whom immunity from popular control is not thought necessary. Further, it is insisted that there is no practical line of distinction between interpretation and legislation, whatever may be the case dialectically. Even the most carefully drawn statute leaves room for alternative construction and to choose between two constructions is in effect to legislate. Further, in the interpretation of the broad phrases of the constitutions, and in the treatment of precedents, just as they did in developing the common law from the register of writs, the judges are legislating, building up a customary law which is as much their creation as any statute is that of the legislature. This power, it is said, the people have come to recognize as giving so wide a latitude to judicial conduct that in a democracy it cannot be immune from some popular control, from subjection to the dominant political convictions of the time. While such control is a dangerous thing in that it may twist the conscience of a judge into pretending there is an ambiguity of expression where there is none, nevertheless it is more dangerous to leave such broad power in the hands of men in no way responsive to popular control.

It is practically quite idle to discuss the comparative value of these lines of argument, if the issue be absolute independence, because it is certain that looking forward to any time we can now hope to influence, the American people will not give up some control over judicial tenure. The consistent tendency of sixty years is if anything stronger to-day than it has ever been before. It is quite useless to consider how often any genuine ambiguity of expression really exists, and whether a sympathetic effort to reassume the position of the legislator or of the preceding judge will not generally solve the problem. The people believe that the usual judge has not the detachment of will which makes this possible for him, and that he will inevitably carry some bias to the problem. I may say that my personal experience with judges quite corroborates that belief. The people have hitherto attempted to correct a bias contrary to the popular will temporarily dominant, by bringing up the judge for examination at stated intervals. They will desire to continue to exercise this control in some equivalent way.

Therefore the question arises, if the judges become appointive in the way I have suggested, what shall be their tenure? Is the governor to appoint them for stated terms during which they are independent? Is he to appoint them on good behavior subject to legislative recall? Is he to appoint them for stated terms subject to legislative recall? Is the action of the legislature in the matter of the recall to be subject itself to a referendum? Is there to be an immediate popular recall? Starting with some popular control over the tenure of judges, which must in any case be the price of the surrender of the power to elect, what is the most desirable plan? This, it seems to me, depends very largely upon the degree to which constitutions are to check the will of the majority. Fixed terms operate for their earlier part to remove the judge from the pressure either of persons or of popular ideas; as they run out they subject him to both. An indefinite tenure, with popular power to recall, substantially removes a judge forever from personal pressure, while it continually subjects him to popular ideas. In so far as the constitutions check the popular will, his integrity is certainly menaced; in so far as by referendum or otherwise the dis-

tinction between the constitution and the popular will is lessened his integrity becomes safer. Yet even in the first case, the protection is not great. Judicial terms in the United States do not on the average exceed six or eight years, I believe. If the judge is to retain entire independence through his term, that term will not be lengthened, and popular memory is likely to last for two or three years.

We may sum up the positions, therefore, as follows: Any limitation of tenure should be objectionable to those who set great store upon constitutional limitations of the immediate popular will, who chiefly dread, in the classic language of American conservatives, the rule of the mob. It is true that to them the present system of fixed terms should be monstrous in that for a substantial period it menaces the judge's constitutional integrity; but in so far as it gives him some measure of independence of popular pressure it is good, even though it submits him also to dependence on persons as his term runs out. To those, on the other hand, who look for a more ready expression of popular will, the fixed term has no advantage in giving independence of popular feeling, while it has the great demerit of subjecting the judge to personal influences. Continuous power to recall eliminates the latter, while a more plastic system would greatly lessen the number of occasions when the judge would come into conflict with such a determined popular feeling as he should fear. To the latter class, therefore, some form of recall is better than fixed stated terms. What, then, is the price which must be paid if terms are to be extended to good behavior —who is to judge that good behavior? Shall it be the governor, the legislature, the people or any combination of the two? A recall by the governor would rather perpetuate the evils of appointments for fixed terms; it may be dismissed. There remain legislative recall, popular recall, and a combination of the two. Legislative recall has been in force in Massachusetts and in many other states for over a century and has been seldom resorted to, though it was used once in Massachusetts most unjustly. It has the advantage of being already customary and of giving better opportunity for preliminary discussion and for recognition of the fact that a judge may have been led to an

undesirable result merely from loyalty to his duties, merely from unwillingness to usurp authority. Nevertheless, if the matter ended with the legislature, it would be no equivalent for the surrender of direct popular control now exercised through fixed terms, and I think it quite clear that the people would not accept it. Moreover, in a state where there was a referendum upon legislative action generally, it would be unlikely that this legislative action alone would remain unreviewable. If the people could review the legislative action, however, there could be no just objection that full control over judges was lacking; it would not be too speedy, but it would be effective.

In conclusion, therefore, we may say that under a system in which the importance of constitutional limitations is not strongly felt because the institutions easily reflect popular feeling, the practical conservative position would be to appoint judges on indefinite terms, subject to recall by the legislature, with referendum to the people, and that this is a thoroughly democratic institution. The radical position would be fixed terms with immediate popular recall. The intermediate position would be indefinite terms with immediate popular recall, from which the judge's position ought, I think, to exempt him. It is not unreasonable to insist upon that opportunity for discussion which the preliminary action of the legislature would insure.